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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KENNETH P. HENDERSON
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED

1. Whether conviction and consecutive sentences for bank fraud, 18 U.S.C. § 1344, and false statements, 18 U.S.C. § 1014, were multiplicitious where all convictions resulted from the same loan?

2. Whether conviction and consecutive sentences for bank fraud, 18 U.S.C. §1344, misapplication of bank funds, 18 U.S.C. §656, and false entries in bank records, 18 U.S.C. §1005, were multiplicitious where all convictions resulted from the same loan?

3. Whether the district court and appellate court erred in considering interest in determining the amount of loss, when the Sentencing Guidelines themselves provide that interest is not to be considered?

4. Whether a bank loan to a completely creditworthy borrower who has full legal liability has criminal "mens rea", and amounts to a crime simply because the bank officer handling the loan fails to disclose an unwritten and unenforceable agreement giving him an "interest" with the creditworthy borrower in the real estate purchased with the proceeds of the loan?

5. Whether the sentencing guidelines are applicable where the alleged "scheme or artifice to defraud", if any, was executed or completed in April of 1985, but the Government offers evidence of obstruction of justice after the effective date of the guidelines?

PARTIES TO THE PROCEEDINGS

The petitioner is Kenneth P. Henderson, and he is represented by Michael M. Essmyer of Essmyer & Tritico, L.L.P., and Clinard J. Hanby of the Law Offices of Clinard J. Hanby. The respondent is the United States of America, which is represented by its attorneys, Guy L. Womack, Assistant United States Attorney, and James L. Turner, Assistant United States Attorney.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 19 F.3d 917 (1994), and is reproduced in the appendix at 1a.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1994. Petitioner filed a timely petition for rehearing on April 27, 1994, which was denied by the court of appeals on May 11, 1994. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §656 (1948) (amended 1989) provided:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000, or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

18 U.S.C. §1005 (1948) (amended 1989) provided:

> Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or
>
> Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note debenture, bond, or other obligation, or mortgage, judgment or decree; or
>
> Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System--
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a

> member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

18 U.S.C. §1014 (1970) (amended 1989) provided:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131--1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owner's Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the account of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the

> Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or any application, advance, discount, purchase, purchase agreement, re-purchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. §1344 (1984) (amended 1989) provided:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> > (1) to defraud a federally chartered or insured financial institution; or
> >
> > (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a federally chartered or insured financial institution, by means of false or fraudulent pretenses, representations, or promises;

> shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.[1]

Texas Statute of Frauds, Tex. Bus. & Com. Code Ann. §26.01 (1977) (amended 1987) provided:

> (a) A promise or agreement described in subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is
>
> > (1) in writing; and
> >
> > (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
>
> (b) Subsection (a) of this section applies to:
>
> > (1) a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate;
> >
> > (2) a promise by one person to answer for the debt, default, or miscarriage of another person;

---

[1] Section 1344(b) merely defined "federally chartered or insured financial institution" as used in section 1344(a).

(3) a contract for the sale of real estate;

(4) a lease of real estate for a term longer than one year;

(5) an agreement which is not to be performed within one year from the date of making the agreement;

(6) a promise or agreement to pay a commission for the sale or purchase of:

(A) an oil or gas mining lease;

(B) an oil or gas royalty;

(C) minerals; or

(D) a mineral interest; and

(7) an agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in Section 1.03, Medical Liability and Insurance Improvement Act of Texas.[2] This section shall not apply to pharmacists.

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[2] Vernon's Ann.Civ.St. art. 4590i.

STATEMENT OF THE CASE

This case centers on a land transaction that occurred in April of 1985. The promissory note, deed of trust, and other documentation relating to the transaction indicated that First Bank and Trust of Tomball, Texas (FBTT) loaned approximately $1.4 million dollars to Dr. Charles Howard in connection with the purchase of 9.33 acres of land on Jones Road in Houston. (R. VI, 169, 173). The $1.4 million consisted partially of a renewal of earlier loans and partially of new money. (R. VI, 171, 173). The Government has not challenged the solvency or credit-worthiness of Dr. Howard (Government's Brief to the Court of Appeals at 34-35).

The evidence, taken most favorably to the Government, showed that Henderson, the Chairman of the Board of FBTT, had an unwritten agreement with Dr. Howard under which Henderson had a 50% interest in the land and 50% obligation under the promissory note. (R. VI, 166-169). This verbal agreement affecting an interest in real estate was completely unenforceable under the Texas Statute of Frauds. Tex. Bus. & Com. Code Ann. §26.01 (Vernon 1968). Henderson arranged the loan and caused it to be approved by the Board of Directors without disclosing this agreement. (R. VII, 169-170). The loan was renewed in April of 1986 (R. VI, 177). Based on the same act of not disclosing the unwritten agreement with Dr. Howard, Henderson was convicted of bank fraud under 18 U.S.C. §1344, misapplication of bank funds under 18 U.S.C. §656, *and* making a false entry in bank records under 18 U.S.C. §1005.

The Sentencing Guidelines took effect on November 1, 1987. In an effort to bring Count I of the case within the guidelines, the Government offered testimony tending to show a "cover-up" of that Count. Dr. Howard testified that

a document dated November 5, 1985, signed by Dr. Howard which recited on its face that Henderson had a mere option to purchase a portion of the Jones Road property was a bogus document which was, in fact, signed at Henderson's request in late 1987. (R. VI, 188-189). Based on this testimony, the sentencing guidelines were applied to Count I.

Counts IV and V were based on a separate loan. Henderson obtained a loan from Cy-Fair Bank, N.A. (Cy-Fair), another bank at which Henderson was Chairman of the Board of Directors, in October of 1986. (R. VIII, 157). The Government's only complaint about this loan was that, at the time this loan was approved, Henderson's personal financial statement, on file at Cy-Fair, did not disclose the earlier FBTT loan and did not list an interest in the Jones Road property as an asset or the note secured by the Jones Road property as a liability. (R. VIII, 178). Based on this same act of non-disclosure, Henderson was convicted of both bank fraud under 18 U.S.C. §1344 and false statements to a bank under 18 U.S.C. §1014.

The sentence was as follows:

Count	Charge	Sentence
1	Bank Fraud	51 months (under guidelines)
2	Misapplication of Bank Funds	5 years, consecutive to count 1
3	False Entries in Bank Records	5 years, concurrent with count 2
4	Bank Fraud	5 years, concurrent with counts 2 and 3
5	False Statements to a bank	2 years, consecutive to all other counts

In addition, the district court ordered 3 years of supervised release under Count 1 to be served upon release from prison, $2,344,646.38 in restitution, and a special assessment of $250.

REASONS FOR REVIEW

1. Whether conviction and consecutive sentences for bank fraud, 18 U.S.C. §1344, and false statements, 18 U.S.C. §1014, were multiplicitious where all convictions resulted from the same loan?
2. Whether conviction and consecutive sentences for bank fraud, 18 U.S.C. §1344, misapplication of bank funds, 18 U.S.C. §656, and false entries in bank records, 18 U.S.C. §1005, were multiplicitious where all convictions resulted from the same loan?

The opinion of the Court of Appeals is in direct conflict with *United States v. Seda*, 978 F.2d 779 (2d Cir. 1992). There, as here, the Government charged both bank fraud under 18 U.S.C. §1344 and false statements under 18 U.S.C. §1014 growing out of the same loan application. The Second Circuit defined the proper inquiry as "whether each of the provisions defining the offenses unambiguously authorizes punishment for a violation of its terms [and] whether the two offenses are sufficiently distinguishable from one another that the inference that Congress intended to authorize multiple punishments is a reasonable one." 978 F.2d at 780. The Second Circuit recognized the general rule that the court should look only to the face of the statutes in determining whether an indictment is multifarious. However, "the Supreme Court has recognized that the rigid 'look-only-at-the-statute' approach is inappropriate in some cases where one of the statutes covers a broad range of conduct." 978 F.2d at 781, **citing, Whalen v. United States, 445 U.S. 684, 694 (1980). The Second Circuit**

proceeded to analyze the situation where both bank fraud and false statements are charged based on the same loan application. The Court held that there was "no realistic likelihood of violating the narrow provision, section 1014, without also violating the broad provision, section 1344." 978 F.2d at 781. The Second Circuit concluded that Congress did not intend that there be two convictions in this situation. Instead, "[t]he broad language of §1344 was intended to insure that defendants could not slip through the cracks of the statutory scheme. It does not suggest that those who violate §1014 may also be guilty of a different crime under §1344." 978 F.2d 779, at 782.

There are really only two possible crimes involved in the present case. Ken Henderson failed to reveal his "gentleman's agreement" with Dr. Howard to the Board of Directors of FBTT at the time they approved the $1.4 million loan. He failed to reveal the same "gentleman's agreement" to Cy-Fair Bank when it approved the second loan. Through artful pleading by the Government, this single undisclosed agreement has been transmuted into five separate crimes and an eleven year, three month prison sentence.

The double conviction and consecutive sentences on the Cy-Fair loan are in irreconcilable conflict with *Seda*. The same non-disclosure was used to support convictions for both bank fraud and false statements. As in *Seda*, it is unimaginable how Henderson could possibly have violated 18 U.S.C. §1014 under these circumstances without also violating 18 U.S.C. §1344. Congress surely intended one crime, not two.

Likewise, the triple conviction for failure to disclose the agreement with Dr. Howard in connection with the original loan is inconsistent with the reasoning of

Seda. The bank fraud statute is so broad that almost any act of misappropriation under 18 U.S.C. §656 also violates 18 U.S.C. §1344. Similarly, it is impossible to conceive of a situation where a person might be guilty of bank fraud through failure to disclose material information without records of the bank also failing to reflect the same information. There was only one act of misconduct involved here, not three.

The Second Circuit is correct that the bank fraud statute was intended to fill in the cracks in the criminal banking statutes. That statute was surely not intended to double the range of punishment for almost every conceivable act of misconduct relating to a bank.

3. Whether the district court and appellate court erred in considering interest in determining the amount of loss, when the Sentencing Guidelines themselves provide that interest is not to be considered?

The Court of Appeals frankly notes that the commentary to the guidelines themselves provide that interest is not to be considered in determining the amount of loss. 19 F.3d at 928. Nevertheless, the Court ruled that interest can be considered in this case. The Court of Appeals reasoned that "[i]nterest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction." 19 F.3d at 928. Petitioner respectfully suggests that the Court of Appeals has misunderstood the reason for this provision in the commentary. In this case the key loan was funded on April 11, 1985. The indictment was not filed until January 7, 1992. The dates on which a defendant is indicted, tried, and sentenced have no relevance to the severity of the crime. If interest can be considered, basic

fairness requires that the defendant be given the opportunity to explore how much of the delay is attributable to the Government. Furthermore, one of two identically situated defendants could receive a harsher sentence because he drew a court with a more crowded docket and the interest brought the loss over a guidelines threshold. Counsel respectfully suggests that the drafters of the guidelines did not wish to see trials about who caused the delay or the condition of the Court's docket. The simple provision that interest not be considered eliminates all of these problems without seriously detracting from the purpose of the guidelines.

4. **Whether a bank loan to a completely creditworthy borrower who has full legal liability has criminal "mens rea", and amounts to a crime simply because the bank officer handling the loan fails to disclose an unwritten and unenforceable agreement giving him an "interest" with the creditworthy borrower in the real estate purchased with the proceeds of the loan?**

The Government has never contended that there was anything wrong with the $1.4 million loan itself. Dr. Howard was a successful physician who had a very strong financial statement. He fully qualified as the recipient of a loan of this nature. The loan was fully secured by real estate, and the Government has never contended that the value of the real estate was misrepresented to the bank. Thus, there is no suggestion that the loan was a "sham" or should not have been approved. The Government's sole complaint is that Henderson had a conflict of interest.

A discussion of this subject should begin with *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974).

There, defendant, a director of a state bank, caused the bank to make eight different loans to several different individuals and one partnership. There was evidence to show that defendant was the true beneficiary of the loans. The proceeds of the loans were invested in a business owned by defendant. However, all of the named borrowers were actual persons with more than adequate resources to repay the loans made to them. All but one of the named borrowers acknowledged liability on the note in the event defendant failed to pay it.

The court discussed three situations in which a loan that does not name the actual beneficiary can accurately be called a "sham", and the bank officer who caused the loan to be made can be successfully prosecuted. These include:

1. **Situations where the defendants knew that the named debtor "was either fictitious or wholly unaware that his name was being used." 493 F.2d at 221-222;**

2. **Situations where the defendants knew the "named debtor was financially incapable of repaying the loan." 493 F.2d at 222; and**

3. **Situations where defendants "assured the named debtor, regardless of his financial capabilities, that they would look for repayment *only* to the third party who actually received the loan proceeds." *Id.***

The court went on to hold that, where the named debtor is both financially capable of repaying and understands his responsibility to do so, there is no crime. Instead, there is only a legitimate loan to a responsible party - precisely what a bank officer should do.

In the present case, as in *Gens*, the named borrower was a real person who knew his name was being used. He had the financial capability to repay the loan, and there is no evidence to show that he was "duped" into believing that he would not be liable on the loan. In addition, the loan was fully secured by valuable collateral. Any harm to the bank was even more theoretical than in *Gens*. The Government should not be permitted to elevate a breach of fiduciary duty into a multitude of federal felonies.

The convictions in the present case suffer from the additional problem that the omissions were not genuinely "false." Petitioner recognizes that omission of a material *fact* with intent to deceive can amount to a "false statement" or "false entry" under the statutes under which Henderson was charged. *United States v. Cordell*, 912 F.2d 769, 773 (5th Cir. 1990). However, the matter fraudulently omitted must be a material *fact*. No court has ever gone so far as to hold that failure to disclose an "interest" and "liability" that rested, in the final analysis, on a gentleman's agreement and could not have been enforced can constitute a false statement for purposes of these statutes.

Williams v. United States, 458 U.S. 279 (1982), addresses this very issue. There, the Court considered whether a check kiting scheme constituted a "false statement" under 18 U.S.C. §1014. The Court construed the statute literally: "[T]echnically speaking a check is not a factual assertion, and therefore cannot be characterized as 'true' or 'false'." 458 U.S. at 284. It is of particular interest to note that the Court looked to the law of the state in which the alleged crime occurred to determine whether the hot checks were "false statements." 458 U.S. at 285-286. Turning to another clause of the

statute, the Court again looked to state law to determine whether check kiting could be regarded as "overvalu[ing]" property or a security: "[A]ssuming that the petitioner's checks were property or a security as defined by §1014, the value legally placed upon them was the value of petitioner's obligation; as defined by Louisiana law, that is the only meaning actually attributable to a bank check." 458 U.S. at 285.

Similarly, in the present case, the Court of Appeals should have looked solely to state law to determine whether there was a false entry or false representation. Legally there could be no false representation by failure to disclose this interest because legally Henderson had no interest to disclose. The Court's suggestion that the jury should somehow look to the federal regulations to determine whether a representation is "false" is spurious. Henderson was not being prosecuted for violation of regulation, and, even if he was, the regulations do not purport to define which interests and obligations are legally binding. All of these statutes require some false statement. The government has not contended that anything other than failure to disclose the purported interest in the Jones Road property constituted a false statement. As stated by the Fifth Circuit in *United States v. Briggs*, 939 F.2d 222, 227 (5th Cir. 1991): "We will not lightly excise an essential element from a criminal statute". The essential element of a false statement was unproven.

5. Whether the sentencing guidelines are applicable where the alleged "scheme or artifice to defraud", if any, was executed or completed in April of 1985, but the Government offers evidence of obstruction of justice after the effective date of the guidelines?

Count I charged that defendant "did knowingly execute and attempt to execute a scheme and artifice to defraud FB&T and for obtaining money and property owned by, and under the care, custody and control of FB&T . . . by means of false and fraudulent pretenses, representations and promises. " (Rec. Excerpts, Tab 4, p. 3). The only time defendant attempted to execute or did execute a scheme to obtain money or property was on April 11, 1985, when the loan was funded. The activities in late 1987 may have been relevant as an attempt to cover up the scheme, but they could not be part of the scheme because the scheme had already been accomplished. The Court of Appeal's opinion on this issue merely shows that there is some evidence the defendant engaged in bad conduct after November 1, 1987. With all due respect, the Court of Appeals does not explain how this particular bad conduct constituted any element of a violation of 18 U.S.C. §1344.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,
v.
Kenneth P. HENDERSON,
Defendant-Appellant.

No. 92-2707.

United States Court of Appeals,
Fifth Circuit.

April 13, 1984.

Bank chairman was convicted in the United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., of committing bank fraud, misapplying bank funds, making false entries in records of federally insured bank, and making false statement to federally insured bank. Chairman appealed. The Court of Appeals, Walter, District Judge, sitting by designation, held that (1) unenforceability of chairman's oral agreement to become borrower's partner in acquiring property with the loan proceeds was irrelevant to charges of bank fraud, misapplication, and false entries, (2) borrower's creditworthiness was irrelevant to charge of misapplying bank funds; and (3) "intended loss" as used in Sentencing Guidelines commentary requiring use of intended loss if greater than actual loss is based on actual, not constructive, intent.

Convictions affirmed, sentences vacated, and case remanded for resentencing.

1. **Banks and Banking 509.10**

Unenforceability of bank chairman's oral agreement with borrower giving interest in property to be acquired with the loan proceeds did not affect chairman's obligation to disclose his interest and did not prevent convictions for bank fraud, misapplication of bank funds, and false entries in records of federally insured bank, whether the interest was partnership or purchase option; statute or frauds cannot be used to facilitate execution of fraud and did not shield chairman from federal banking regulations. 18 U.S.C.A. §§ 656, 1005, 1344.

2. **Banks and Banking 509.10**

Bank chairman who entered oral agreement with borrower to become partner in acquiring property with the loan proceeds was not shielded from federal banking regulations by Texas' statute of frauds making the oral agreement unenforceable.

3. **Banks and Banking 509.10**

Bank chairman breached fiduciary duty as member of bank board of directors by failing to disclose interest in borrower's property to be acquired with the loan proceeds, whether interest was partnership or purchase option.

4. **Frauds, Statute of 119(2)**

Texas' statute of frauds may not be used to facilitate execution of fraud.

5. **Banks and Banking 509.10, 50915, 509.20**

Interest in subject of bank transaction need not be legally enforceable to warrant disclosure required by criminal statutes on bank fraud, misapplication of bank funds, false entries in records of federally insured bank, and false statements to federally insured bank. 18 U.S.C.A. §§ 656. 1005, 1014, 1344.

6. **Banks and Banking 509.10**

Bank chairman engaged in "scheme or artifice to defraud" bank and, therefore, committed bank fraud when he failed to inform bank directors of his interest as borrower's partner in acquiring property with the loan proceeds, voted on the loans, and took active steps to keep agreement with borrower concealed. 18 U.S.C.A. 344.

See publication Words and Phrases for other judicial constructions and definitions.

7. **Banks and Banking 509.15**

Borrower's creditworthiness was irrelevant to charge that bank chairman misapplied bank funds as borrower's partner in acquiring property with the loan proceeds. 18 U.S.C.A. § 656.

8. **Banks and Banking 509.10, 509.15, 509.20**

Creditworthiness of borrower will not insulate bank officer from charges of bank fraud, misapplication of bank funds, false entries in records of federally insured bank, or false statements to federally insured bank. 18 U.S.C.A. §§ 656, 1005, 1014, 1344.

9. **Banks and Banking** **509.25**

Specific evidence of borrower's financial status was irrelevant in prosecution of bank chairman for bank fraud, misapplication of bank funds, false entries in records of federally insured bank, and false statements to federally insured bank, in that borrower's creditworthiness did not insulate chairman from the charges arising out of chairman's interest in property acquired with the loan proceeds. 18 U.S.C.A. §§ 656, 1005, 1014, 1344.

10. **Witnesses** **414(2)**

Borrower's prior consistent statement indicating witness was told about "sham option agreement" with bank chairman during early 1988 was offered to rebut chairman's implied charge of recent fabrication or improper influence or motive and was admissible in prosecution for fraudulent banking activities arising from chairman's interest as partner in acquiring property with the loan proceeds; borrower had previously testified that letter was prepared in late 1987 or early 1988, rather than 1985, and chairman questioned borrower about the letter with the 1985 date, asked about timing of alleged FBI investigation of chairman, and thus implied that borrower was lying about the letter to help protect FBI and himself. Fed.Rules Evid.Rule 801(d)(1)(B), 28 U.S.C.A.

11. **Criminal Law** **1210(4)**

Consecutive sentences were permissible for bank chairman's bank fraud, misapplication of bank funds, and false entries in records in connection with loan to chairman's partner for acquiring property for another bank, and they were permissible for bank fraud and false statement to federally insured bank in connection with the other bank's

loan to chairman without disclosing his interest in the property; each offense involved element not found in the other offenses. 18 U.S.C.A. §§ 656, 1005, 1014, 1344; U.S.C.A. Const.Amend. 5.

12. **Double Jeopardy 29.1**

Sentences are multiplicious for double jeopardy purposes if same act results in multiple punishments for multiple counts under same criminal provision. U.S.C.A. Const.Amend. 5.

13. **Double Jeopardy 134**

It is presumed that Congress intends that every crime carry its own punishment.

14. **Double Jeopardy 29.1**

As long as crimes can be properly characterized as different offenses for double jeopardy purposes, defendant convicted of multiple crimes may receive cumulative punishment. U.S.C.A. Const.Amend. 5.

15. **Criminal Law 1237**

Sentencing court was not clearly erroneous in concluding that bank chairman's fraud continued past effective date of Sentencing Guidelines; evidence indicated that letter connected to the bank fraud was prepared after the effective date. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

16. **Constitutional Law 270(1)**
Criminal Law 1316

Due process clause did not entitle defendant to hearing on issue of amount of loss for calculating sentence; defendant could have presented sentencing judge with all information necessary to calculate amount of loss without cross-examining government's sources. U.S.C.A. Const.Amends. 5, 14.

17. **Criminal Law 1147**

Sentencing court must be given deference to determine whether hearing is needed on particular sentencing issues.

18. **Constitutional Law 270(1)**

When hearing is necessary to protect defendant's due process rights, then failure to hold hearing would be abuse of discretion. U.S.C.A. Const.Amends. 5, 14.

19. **Fraud 69(1)**

"Intended loss" as used in guidelines comment requiring sentencing court to use intended loss from loan, if greater than actual loss, is based on actual, not constructive, intent; thus, sentencing court must determine if defendant actually intended to cause loss and may not base calculation on principle that defendant intends result of acts. U.S.S.G. §2F1.1, comment. (n.7), 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

20. **Fraud 69(1)**

Interest that victim had reasonable expectation of receiving from loan transaction should be included in calculating amount of loss for sentencing; thus, commentary to Sentencing Guidelines sweeps too broadly in stating that amount of loss "does not, for example, include interest that victim could have earned on the funds had the offense not occurred." U.S.S.G. § 2F1.1, comment. (n.7), 18 U.S.C.A.App.

Michael M. Essmyer, Clinard J. Hanby, Essmyer & Associates, Houston, TX, for appellant.

Guy L. Womack, Paula Offenhauser, Asst. U.S. Attys., James L. Turner, Ronald G. Woods, U.S. Atty., Houston, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD and BARKSDALE, Circuit Judges, and WALTER[1], District Judge.

WALTER, District Judge:

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[1] District Judge of Western District of Louisiana, sitting by designation.

Kenneth P. Henderson appeals his conviction for fraudulent banking activities.[2] Henderson questions the sufficiency of the evidence and several of the trial judge's evidentiary rulings. Finally, Henderson argues that the trial court erred in applying the sentencing guidelines to count one of the indictment. For the reasons that follow, we affirm in part and reverse in part.

Background

This case involves a long-term professional relationship and personal friendship gone awry. Kenneth P. Henderson began to handle Dr. Charles Howard's banking business in 1970. Over the years, the two became close personal friends and trusted business associates. Unfortunately, this relationship led ultimately to Mr. Henderson disregarding important federal banking regulations. To understand how Mr. Henderson and Dr. Howard got to this point, we must retrace their relationship from its early days.

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[2] Henderson was convicted on five counts. Counts one and four charged Henderson with bank fraud in violation of 18 U.S.C. § 1344. Count two involved a violation of 18 U.S.C. § 656, for misapplying bank funds. The third count was brought under 18 U.S.C. § 1005, for making false entries in the records of a federally insured bank. Count five charged a violation of 18 U.S.C. § 1014, for making false statements to a federally insured bank. All five counts also involved 18 U.S.C. § 2, which defines those persons that may be charged as principals.

The indictment alleges that Henderson defrauded, or attempted to defraud. 18 U.S.C. § 1344(1), and obtained or attempted to obtain money or property owned by and under the care, custody and control of the banks. 18 U.S.C. §1344(2). Although neither the indictment nor the judgment cite a specific subsection of section 1344, the government offered evidence that subsections (1) and (2) were violated by Henderson.

Kenneth Henderson met Dr. Howard in 1970, while Henderson was president of Northshore Bank in Houston, Texas. A friendship developed, and when Henderson left Northshore in 1973 to become president of Greater Houston Bank, he took Dr. Howard's account with him. Henderson left Greater Houston in 1979, taking over the Vice Presidency of the Board of Directors at First Bank and Trust (FB & T) in Tomball, Texas. Again, Dr. Howard's accounts followed. Henderson soon became the Chairman of the Board of Directors of FB & T.

Dr. Howard held investments in certain hospitals and other real estate in the Houston area. During a visit to one of these hospitals in 1982, Henderson and Howard discussed the prospects for opening a new bank. They believed that northwest Houston had growth potential and would be an excellent location for a bank. Dr. Howard and other businessmen then applied for a federal bank charter in the name of Cy-Fair Bank, N.A. (Cy-Fair). The charter was granted and Cy-Fair opened in a shopping center near Jones Road in northwest Houston.

Henderson and Howard began looking for property in the region to build a permanent bank building for Cy-Fair, complete with drive-through facilities. Sometime in 1982 or 1983, Henderson located a 9.3 acre parcel along Jones Road. Howard agreed that this lot would be a good location for the new Cy-Fair bank. Henderson and Howard then orally agreed to become partners in the acquisition of the Jones Road property. Howard agreed to borrow the money for the purchase in his own name, and Henderson agreed to reimburse Howard for half the loan payments and other costs associated with the Jones Road property.

Henderson and Howard agreed to borrow the money for the Cy-Fair bank property from FB & T, a bank owned

by Henderson.[3] In April of 1983, Henderson, acting as loan officer for FB & T made a $456,818.62 loan to Dr. Howard for three acres of the Jones Road property. This loan was ratified by the FB & T Board at its May, 1983 meeting.[4] Henderson made a second loan to Dr. Howard on April 16, 1984, for $443,000.00, which covered another 1.5 acres along Jones Road. The FB & T Board ratified this loan at its May, 1984 meeting. Dr. Howard received a third loan—again with Henderson acting as loan officer —for the Jones Road real estate on April 11, 1985. The FB & T Board ratified this loan in May, 1985. The 1985 loan covered the remaining Jones Road acreage and consolidated the previous two loans; the 1983 and 1984 loans were paid, including $100,000 in interest , with the 1985 loan. The 1985 loan was for $1,435,000.00 and had a maturity date of April 11, 1987. On April 11, 1986, Henderson extended the Jones Road loan, changing the maturity date to April 11, 1989.

All the loans on the Jones Road property were in Howard's name. However, the financial statements filed by

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[3] Henderson claims to have owned only a 23% interest in FB & T. It is undisputed that he was the largest shareholder in FB & T and served as Chairman of the FB & T Board of Directors from 1979 until the bank was taken over by the FDIC in 1988.

Henderson was also one of the seven founding directors of Cy-Fair Bank and served as Chairman of the Cy-Fair Board from its founding in 1983 until December 1986. Cy-Fair failed on April 14, 1988.

[4] It is not clear whether the Board customarily pre-approved loans of this nature or simply ratified loans already extended. The government implies, and certain testimony supports that Henderson should have received board approval before making the loan to Dr. Howard. Henderson contends that the loans to Dr. Howard were handled in the same manner as all other FB & T loans.

Dr. Howard for the 1984 and 1985 loans indicated that only half the payments were being made from Howard's own assets. Henderson voted to ratify these loans at the FB & T Board meeting, over which he presided. It was clear from the minutes of these meetings that the other directors knew Henderson had personally made these loans to Dr. Howard. Henderson never disclosed that he was Dr. Howard's "silent partner" in the Jones Road property.

In June of 1985, Henderson and Dr. Howard decided to bring in two additional partners to spread the risk associated with the Jones Road venture. Leo Kalantzakis and Dr. Richard Hausner became full partners during the summer of 1985, each assuming responsibility for one-quarter of the costs of the property. Both testified that Henderson and Howard held themselves out as partners in this investment. They also testified that Henderson never acted as though his interest in the Jones Road development differed in any way from that of the other partners. Henderson paid for his share of the loan costs, taxes, and other expenses.

Two factors combined to doom the plans for the new Cy-Fair bank. First, the Houston economy began to slump during late 1985 and remained flat through 1986 and 1987. Second, five new banks were granted charters within a five mile radius of Cy-Fair. These conditions did not favor the Cy-Fair Bank expansion. Therefore, the Jones Road partners—Henderson, Howard, Kalantzakis, and Hausner—decided to put off building the new Cy-Fair Bank building. This decision make it difficult for the partners to make their payments on the FB & T loan.

During 1986, Henderson applied for and received a $147,500 loan from Cy-Fair. He presented two financial statements, dated June 15, 1984, and July 1, 1986, neither of which indicated any interest in the Jones Road property. Nor

did Henderson disclose that he was making payments related to the Jones Road property on the cash flow portion of these financial statements.

In late 1987 an FDIC examination began to focus on FB & T's 1985 loan to Dr. Howard. An FDIC report, dated November 21, 1987, classified that loan as "worrisome". When Henderson found out about this investigation, he contacted Dr. Howard and asked for a letter showing that Henderson was never a partner in the Jones Road venture, but held an option to purchase an interest in the property. Howard testified that he agreed to sign such a letter out of compassion for Henderson. Henderson presented this letter at trial bearing a November 5, 1985 date.

The government presented several reasons to doubt the authenticity of the November 5, 1985 letter. First was Dr. Howard's direct testimony that the letter was prepared by Henderson and signed in either late 1987 or early 1988. Next the government pointed out that the November 5, 1985 letter referred to 6.14 acres, although Howard and his partners owned 9.32 acres at that time.[5] Further, the letter referred to a maturity date of April 11, 1989, although the Jones Road loan had a maturity date of April 11, 1987 on November 5, 1985. The maturity date was extended to 1989 when the loan was refinanced on April 11, 1986. Finally, Dr. Hausner testified that Dr. Howard told him of Henderson's request for a "sham option" letter sometime

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[5] In June, 1986, *seven months after the alleged November 5, 1985 letter*, the seller of the Jones Road property foreclosed on 3.14 acres, leaving Howard and his partners with 6.14 acres. On November 5, 1985, the partners still owned the entire 9.32 acre tract, subject of course to the FB & T loan.

during early 1988. Howard told Hausner that he expected Henderson to try to use the letter to avoid liability on the FB & T loan.

Henderson presented two additional letters, allegedly signed by Dr. Howard, to show that he held only an option on the Jones Road property. A letter dated November 4, 1985 indicated that Henderson held an option to purchase one-half of Dr. Howard's interest in the Jones Road lot. The second letter, dated April 16, 1987, stated that Henderson's option had been terminated because of his failure to make the required payments. Both letters were attacked as bogus by the government. Howard denied ever seeing or signing either letter. Neither letter was similar in type style to the November 5, 1985 letter.

An expert on banking regulations testified that Henderson's actions jeopardized the financial integrity of both FB & T and Cy-Fair. According to this expert, Henderson's conduct exposed both banks to regulatory penalties, which can have an indirect, detrimental effect on a bank's business. Further, Henderson exposed the banks to direct risk of loss by making or requesting funds for suspect projects without disclosing all the details of these endeavors.

Board members from FB & T and Cy-Fair testified that both loans probably would have been made even if Henderson had disclosed his interest in the property. These directors also testified that they were aware of the regulations requiring disclosure of such interests, and that an interested director is prohibited from taking part in transactions affecting his interest. The FB & T directors stated that, in their opinion, Henderson should not have acted as loan officer for the Jones Road loans and that he should not have participated in the ratification votes on these loans. I was also shown that Henderson had properly disclosed an interest

in bank loans in the past, indicating that he understood the relevant regulations.

I. Sufficiency of the Evidence

Henderson raises three specific issues concerning the sufficiency of the evidence presented at his trial. First, Henderson questions whether an interest based on an unenforceable oral contract can support a conviction for bank fraud, misapplication, or false statements. Second, Henderson argues that a bank officer's failure to disclose a personal interest in a loan cannot constitute bank fraud. Finally, Henderson asks whether a loan to a credit-worthy borrower constitutes misapplication of bank funds because the loan officer has an undisclosed interest in the proceeds of the loan.[6]

A. The Statute of Frauds

[1] Henderson's statute of frauds argument proceeds in two steps. First, Henderson argues, the statute of frauds makes the oral agreement with Dr. Howard unenforceable. Henderson then contends that there is no obligation to disclose unenforceable contracts. This argument misconstrues both the statute of frauds and the substantive federal criminal provisions involved in this case.

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[6] At oral argument, Henderson also argued that his failure to inform FB & T of his interest in the Jones Road property could not constitute bank fraud under 18 U.S.C. § 1344, because his omission were not material. Henderson relies on the testimony of two FB & T directors that the loans to Dr. Howard probably would have been made even had Henderson informed the FB & T Board of his interest in the Jones Road land. However, there was also testimony that the Directors of FB & T realized that Henderson had violated banking regulations by failing to disclose his interest. There was sufficient evidence to support the jury's conclusion that Henderson's omissions were material.

"[T]o prevent fraud by those who would misrepresent verbal promises, the statute [of frauds] require(s) written proof in certain cases before performance can be enforced in the courts." *Clements v. Withers*, 437 S.W.2d 818, 821 (Tex.1969) (Reavley, J.). Henderson contends that the statute of frauds would "slam the door shut on" Dr. Howard had the doctor tried to enforce the contract. However, that is not the question. The question is whether or not Henderson stood to benefit from the loans to Dr. Howard.

[2,3] The statute of frauds does not shield Henderson from federal banking regulations. If Henderson hoped to profit on the Jones Road property, he was "interested". It doesn't matter whether Henderson was a full partner or just held an option on the property. Either way, Henderson stood to gain as a result of FB & T's decision to extend credit to Dr. Howard. Henderson breached his fiduciary duty as a member of the FB & T Board by failing to disclose his interest. The only way the statute of frauds would change this analysis is if Dr. Howard had already rejected the agreement when the loans were made. Henderson has made no such claim.

[4] The statute of frauds may not be used to facilitate the execution of a fraud. Henderson's covert agreement with Dr. Howard was oral to prevent its detection. To use the statute of frauds to invalidate this agreement would insulate Henderson's fraudulent activities. The Texas Supreme Court has held that such conduct cannot be protected by invoking the statute of frauds. *Nagle v. Nagle*, 633 S.W.2d 796, 799 (Tex. 1982) (citing *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114, 1116 (1921)).

[5] Henderson argues that an interest in the subject of a bank transaction must be a legally enforceable interest to warrant disclosure. We disagree. It is enough that

Henderson intentionally hid his interest in the Jones Road property. *See, e.g., United States v. Kington*, 875 F.2d 1091, 1100-01 (5th Cir. 1989) (failure to disclose that a loan was made to purchase bank stock from the loan officer is fraudulent and supports a conviction under 18 U.S.C. § 656 (misapplication of bank funds)).

B. Fiduciary Duties and Bank Fraud

[6] Henderson's second sufficiency argument focuses on the bank fraud count for the 1985 FB & T loan to Dr. Howard. Henderson contends that "this case involves nothing more than a breach of fiduciary duty," and therefore, does not constitute a "scheme or artifice" to defraud under 18 U.S.C. § 1344. We disagree.

In the first place, this case involves more than a breach of fiduciary duty. Henderson's activities violated federal banking regulations and exposed FB & T to civil penalties. Further, Henderson did more than sit quietly by while the FB & T Board approved a loan in which he was interested. Henderson had an obligation to avoid participating in any bank transactions that affected him personally. Henderson was also obliged to inform the Board of Directors of his interest—however he defined it—in the Jones Road real estate. Finally, Henderson had a duty to abstain from the Board vote on the Jones Road loans.

There was also evidence that Henderson took active steps to keep his agreement with Dr. Howard concealed. Howard testified that Henderson wanted their agreement oral so that no one could trace the loan back to Henderson. Henderson accepted Howard's financial statements without question, even though those statements clearly indicated that Howard had a "silent partner" paying half the loan costs. Finally, there was evidence that Henderson created bogus

letters to characterize his interest in the Jones Road property as an option. There was sufficient evidence to allow a rational juror to conclude, beyond a reasonable doubt, that Henderson's actions constituted a "scheme or artifice" to defraud FB & T.[7]

C. Credit Worthiness of Dr. Howard

[7] Henderson's final sufficiency attack goes to count two: misapplication of bank funds in violation of 18 U.S.C. § 656. This count is based on Henderson's role in securing the 1985 FB & T loan for Dr. Howard. Henderson argues that because Dr. Howard was a credit worthy borrower, there can be no violation of section 656. Again, we disagree.

In *United States v. Saks*, 964 F.2d 1514, 1519 (5th Cir.1992), this court held that the financial well being of the borrower would not prevent a conviction for bank fraud under 18 U.S.C. § 1344. In support of this conclusion, the court approvingly cited cases from other circuits, including *United States v. Walker*, 871 F.2d 1298 (6th Cir. 1989), *Walker* involved a conviction for misapplying bank funds. The following excerpt is particularly appropriate:

> In this case, evidence of Hastings' and Hollaway's credit worthiness and their understanding of the obligation to repay was irrelevant, as the trial court held. Mr. Walker arranged these loans for his own benefit, concealing his interest in them from other

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[7] **Because we find sufficient evidence of more than a mere breach of fiduciary duty, we need not reach the question of whether or not such a breach alone can constitute a "scheme or artifice" to defraud.**

> bank officials. With these facts, the government adequately established Walker's intent to defraud the bank.
>
> The fact that the loans were otherwise "good" loans, and that the named borrowers understood their obligation to repay the loans if Walker defaulted on them, is irrelevant because Walker personally benefited from the transactions at issue.

Walker, 871 F.2d at 1307. We adopt the reasoning of the Sixth Circuit and hold that the credit worthiness of Dr. Howard was irrelevant to the misapplication of bank funds charge against Henderson.

II. *The Trial Court's Rulings*

Henderson questions three rulings of the trial court. First, Henderson argues that the judge erred in excluding expert testimony concerning the statute of frauds or in the alternative that the judge should have instructed the jury of the statute of frauds. In the second ruling questioned by Henderson, the trial judge excluded certain evidence concerning Dr. Howard's wealth. Finally, Henderson complains that a government witness' testimony was improperly bolstered using a prior consistent statement. We reject each of these arguments.

The statue of frauds offers no refuge to Henderson. Because Henderson's obligation to disclose his interest in the Jones Road property does not depend on the applicability of the statute of frauds to his agreement with Dr. Howard, the trial court was correct in excluding expert testimony on this subject. Further, the judge's jury instructions properly defined the elements of the charges against Mr. Henderson. There was no reason to confuse the jury with an unnecessary instruction concerning the statute of frauds.

[8,9] This court has held that the credit worthiness of a borrower will not insulate a bank officer from charges of bank fraud, *United States v. Saks*, 964 F.2d 1514, 1519 (5th Cir. 1992). The same principle applies to the other charges against Henderson. More importantly, the trial judge did not exclude all evidence of Dr. Howard's wealth. He allowed testimony to the effect that Howard was a wealth man. Henderson objected when the judge refused to allow specific evidence of Dr. Howard's financial status. We believe the judge acted properly in excluding this evidence.

[10] Henderson complains that the trial court improperly allowed Dr. Hausner to bolster the testimony of Dr. Howard with a prior consistent statement. Under Federal Rule of Evidence 801(d)(1)(B), a prior consistent statement may only be "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Fed.R.Evid. 801(d)(1)(B).

This objection refers to Dr. Hausner's testimony that Dr. Howard told him about the"sham option agreement" letter during early 1988 (the letter dated November 5, 1985). The government elicited this information to support Dr. Howard's prior testimony that this letter was, in fact, prepared in late 1987 or early 1988, rather than 1985. Henderson argues that Dr. Howard's testimony on this point was not attacked during cross examination, and therefore, the testimony of Dr. Hausner should have been excluded.

A review of the record indicates that Henderson did question Dr. Howard about the letter dated November 5, 1986. In fact, Henderson offered the two other letters—the option letter dated November 4, 1985 and the option termination letter dated April 16, 1987—in connection with this questioning. Howard was also asked about the timing of an alleged FBI investigation of Henderson, implying that

Howard was lying about the letter dated November 5, 1987, to help the FBI and to protect himself. Henderson even asked Howard about a civil suit in which the FDIC sued Howard to recover on the Jones Road loans. All of this questioning casts Dr. Howard's testimony regarding the letter dated November 5, 1985 into doubt. It also raises questions about Dr. Howard's motives and possible collusion between Howard and the government. We believe that these questions constitute an "implied charge against [Dr. Howard] of recent fabrication or improper influence or motive." Fed.R.Evid. 801(d)(1)(B). There was no error in admitting the testimony of Dr. Hausner.

III. Sentencing Issues

[11] Four issues are raised by Henderson concerning his sentencing. Henderson first questions the trial judge's decision to impose consecutive sentences on the courts related to the 1985 FB & T loan to Dr. Howard. The same issue is presented by the sentences imposed on counts four and five, which relate to the financial statements filed in connection with Henderson's 1986 loan from Cy-Fair. Third, Henderson objects to the district court's use of the Sentencing Guidelines for count one. Henderson's final objection—and the only objection with merit in this appeal—concerns the amount of loss to FB & T and Cy-Fair caused by Henderson's activities.

A. Consecutive Sentencing

The district court sentenced Henderson to five years in prison on counts two, three and four,[8] with all three

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[8] Count two charged violation of 18 U.S.C. § 656 for misapplication of bank funds due to the 1985 FB & T loan to Dr. Howard. Count three charged violation of 18 U.S.C. § 1005 for making

sentences to run concurrently. Count one, bank fraud for the 1985 FB & T loan, resulted in a 51 month sentence under the Sentencing Guidelines. This sentence runs consecutively with the five years imposed on counts two, three, and four. Henderson was sentenced to an additional two years on count five for making false statements to Cy-Fair Bank in the financial statements filed with his loan application. Henderson faces a possibility of eleven years and three months in prison (51 months for count one, plus five years for counts two, three, and four, plus two years for count five).[9]

Henderson argues that consecutive sentences based on the same conduct are multiplicious, and therefore, must be vacated. According to Henderson, sentences for the counts related to the 1985 FB & T loan to Dr. Howard must run concurrently. The same would be true for the two counts based on Henderson's 1986 loan from Cy-Fair. Under this logic, the sentences for counts one, two, and three, which must run concurrently with each other, could be consecutive with counts four and five. Henderson misunderstands the law of multiplicious sentencing.

[12] Claims of multiplicious sentencing generally fall into two distinct categories. First, sentences are multiplicious if the same act results in multiple punishments for multiple counts *under the same criminal provision*. Our recent decision in *United States v. Hord*, 6 F.3d 276 (5th

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false entries in bank records, due to Henderson's failure to inform FB & T of his interest in the Jones Road property. Count four charged Henderson with bank fraud, 18 U.S.C. § 1344, for his 1986 loan from Cy-Fair.

[9] Henderson is eligible for parole on counts two through five, because those sentences were not imposed under the Sentencing Reform Act of 1984.

Cir. 1993), is illustrative. Hord was convicted on 19 counts, nine of which were brought under the bank fraud provision, 18 U.S.C. § 1344. These nine counts were based on depositing bogus checks, withdrawing the funds, and then having a bank regulator "pull" the checks before they were processed. Hord was charged under a different count for each deposit and withdrawal. We vacated the sentences and the associated monetary assessments for the three counts based on the attempted withdrawals, because they were multiplicious with the counts based on the deposits. We held that it was the deposit that consummated the "scheme" requirement of section 1344, and that the attempted withdrawals were simply additional steps in the same "schemes". *Hord*, 6 F.3d at 282. Each "scheme" constituted bank fraud, but to punish twice for a single bank fraud would violate double jeopardy. In cases like *Hord*, the legal question raised is whether or not the separate counts under the same criminal provision actually constitute separate violations of that law.

Multiplicity may also be a question when a single act provides the basis for convictions under different criminal laws. Again the question raised is whether or not multiple counts are actually the same offense. However, in this context,

> [t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is to determine whether each provision requires proof of a fact which the other does not.

United States v. Galvan, 949 F.2d 777, 781-82 (5th Cir. 1991) (citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)).

Henderson's claims fall into the second category. Therefore, we must determine whether or not the proof required for bank fraud differs from that required for either misapplication or making a false entry.[10] It does. In fact, each of these criminal provisions involves an element not found in the others. Bank fraud requires a "scheme or artifice" to defraud. No similar requirement is found in either 18 U.S.C. § 656, misapplication, or 18 U.S.C. § 1005, making a false entry. Misapplication requires that the bank official "misapply" the funds, that is, that he either make the questioned loan or play a significant role in the decision to make the loan. Neither bank fraud nor making false entries contains this requirement. Finally, making a false entry obviously contemplates entries made in official bank records, an element missing from bank fraud and misapplication. Henderson's multiplicity argument fails as to the three counts based on the 1985 FB & T loan to Dr. Howard.

Henderson fares no better on the counts related to the 1986 Cy-Fair loan. These counts were based on bank fraud, 18 U.S.C. § 1344, and making a false statement to an insured bank, 18 U.S.C. § 1014. Again, the two crimes are different. There is no "scheme or artifice" requirement in section 1014. Further, there is no requirement that the person charged with bank fraud make a materially false statement to an insured bank.

[13,14] There is a constitutional reason for this result. When Congress enacts a criminal law, pursuant to an enumerated power, Congress determines the appropriate punishment or range of punishments for that crime. If Congress defines multiple crimes that may be implicated by

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[10] Counts two and three run concurrently, and therefore, raise no multiplicity concern.

the same conduct, there is a strong presumption that Congress intended that each criminal provision apply. Only by enforcing every law violated by certain conduct can the prosecutor effectively vindicate the interests served by each distinct criminal enactment. Similarly, it is presumed that Congress intends that every crime carry its own punishment. Therefore, as long as the crimes can be properly characterized as different "offences" for double jeopardy purposes, a defendant convicted of multiple crimes may receive cumulative punishment. Henderson could have received consecutive sentences on every count of this indictment.

B. Applicability of the Sentencing Guidelines to Count One.

[15] Henderson contends that the bank fraud alleged in count one was complete before November 1, 1987, the effective date of the Sentencing Guidelines. The district court made a factual finding that count one continued past November 1, 1987, and therefore, applied the Guidelines. We review this finding for clear error.

The trial court heard the testimony concerning the letter dated November 5, 1985. Substantial evidence was offered to show that this letter was actually prepared in late 1987 or early 1988. Dr. Howard also testified that this letter was either prepared by Henderson or prepared at his request. Further, evidence from the grand jury investigation of Henderson, which was presented at the sentencing hearing, indicated that this letter was prepared a few months before the failure of FB & T. This evidence led the district judge to find

> that the engagement between the defendant and Dr. Howard occurred in and after

> November of 1987 based upon what I heard at trial and based upon what you presented here in court; and if you find something in there different than that, then read it to me. I would like to hear it.
>
> But what I heard so far is that it was about the time the bank failed, which was in March of '88, or a few months prior to that. A few to me means three or less; and of course, that would put it back in November, December of 1987.

Given this evidence of Henderson's continuing efforts to deceive both FB & T and federal regulators into late 1987 or early 1988, we do not find the district court's conclusion clearly erroneous.

C. The Amount of Loss Calculation

[16] Henderson requested a hearing on the amount of loss. He hoped to show that the amount calculated in the pre-sentencing report (PSR) was incorrect. The district court denied this request, and instead considered Henderson's written objections to the PSR and the evidence proffered at sentencing. The district court then adopted the calculations made in the PSR, but modified the amount of loss to include interest on the two fraudulent loans. Henderson renews his objections on appeal. "In examining a challenge to a sentence based on the Guidelines, we must accept the factual findings of the district court unless they are clearly erroneous, but we fully review its application of the Guidelines for errors of law." *United States v. Rodriguez*, 925 F.2d 107, 109-10 (5th Cir. 1991). We review the district court's denial of Henderson's hearing request for an abuse of discretion.

We first consider the district court's denial of Henderson's hearing request. At the outset we note that a sentencing hearing was conducted, and that the amount of loss issue was discussed at that hearing. Henderson's objection, therefore, goes to the form of the hearing, and more specifically, to the district judge's refusal to allow testimony at the sentencing hearing. Essentially, Henderson requested a mini-trial, complete with exhibits, expert witnesses, character witnesses, and an opportunity to cross examine the government's witness. Refusing to conduct such a hearing does not constitute an abuse of discretion in this case.

Henderson had an opportunity to review the PSR and file formal objections to that report. He could have filed affidavits and other exhibits in support of his position. At the sentencing hearing, Henderson presented several exhibits and objected to some of the exhibits proffered by the government. Henderson's due process rights were protected adequately by these procedures.

[17,18] We recognize the due process concerns behind this issue. However, we believe that a sentencing court must be given deference to determine whether a hearing is needed on particular sentencing issues. When a hearing is necessary to protect a convicted defendant's due process rights, then a failure to hold a hearing would be an abuse of discretion. We do not believe Henderson's due process rights were violated. Henderson could have presented the sentencing judge with all the information necessary to calculate the amount of loss without cross examining the government's sources.

[19] The district court calculated a $2,344,646.38 loss due to Henderson's actions, which included the face value of both the 1985 FB & T loan and the 1986 Cy-Fair

loan, plus interest on both loans. Henderson argues that the district court should have reduced this amount to account for value recovered, or likely to be recovered, by the banks or the FDIC on these loans. Henderson further objects to the inclusion of interest in the amount of loss.

We must first determine what procedure the district court used to determine the amount of loss. If the district court's calculation was an estimate of the actual loss caused by the two loans in question,

> the lose is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (*or can expect to recover*) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

United States Sentencing Commission, *Guidelines Manual*, § 2F1.1, comment, (n.7) (emphasis added).

The district court based Henderson's sentence on an intended loss.[11] This decision was based on the district

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[11] If the district court's calculation was an estimate of the actual loss caused by Henderson, that calculation was erroneously performed. The district court refused to consider whether or not the banks or the FDIC were likely to recover on the defaulted loans.

> It's not a question of whether or not—in my opinion it's not a question of whether or not the bank has ever collected its money or whether it's ever written off the loss or not. It's an exposure the bank had .... I think that's what the guidelines and the statute deals [sic] with, not whether or not somebody can collect the

judge's understanding of the meaning of "intended loss" under the Sentencing Guidelines. The following excerpts from Henderson's sentencing are illustrative:

> The question is did I remove something that I shouldn't have removed, did I do something that I shouldn't have done, are the circumstances surrounding the loss such that any reasonable person would conclude that there is fraud and deceit and cheating going on. Are those the circumstances? If they are—and that's what the jury found. If they are, then, it was a loss that was intended because we intend the result of the acts that we take.
>
> That's what the law is. We intend the result of the acts we take except in some circumstances.

We find this interpretation erroneous.

The Sentencing Guidelines refer to actual intent, not constructive intent. "[I]f an intended loss that the *defendant was attempting to inflict* can be determined this figure will be used if it is greater than the actual loss." U.S.S.G. § 2F1.1, comment, (n.7). If Henderson intended to repay the banks on his loans, the district court should not have used intended loss as the basis for sentencing.

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money or not.

No effort was made to reduce the amount of loss "by the amount the lending institution has recovered (or can expect to recover)." U.S.S.G. § 2F1.1 comment. (n.7).

In *United States v. Wimbish*, 980 F.2d 312 (5th Cir. 1992), we held that the face value of stolen and forged checks was properly used as an intended loss because the victims were put at risk for the full face value of their checks. *See also*, *United States v. Brown*, 7 F.3d 1155, 1159 (5th Cir. 1993) (holding that full value of stolen money orders constitute intended loss because, "the defendant *clearly intended Lemoriello to suffer a loss exceeding $5,000.*") (emphasis added); *United States v. Sowels*, 998 F.2d 249, 251 (5th Cir. 1993) (holding that stolen credit cards indicate an intent to cause a loss equal to the credit limits of the cards). These cases show that the intended loss for stolen or fraudulently obtained property is the face value of that property.

Unlike the cases cited *supra*, where the defendant intends to repay the loan or replace the property, the intended loss is zero. The face value of the property bears no relation to the "loss the defendant was attempting to inflict." U.S.S.G. § 2F1.1, comment, (n.7). Because the district court misinterpreted the meaning of "intended loss" under the Sentence Guidelines, we must vacate the sentence on count one. The district court must determine if Henderson actually intended to cause a loss to either bank, and if so, the amount of the "intended loss". Only if this value is greater than the actual loss to the banks should it be used to determine Henderson's sentence.[12]

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[12] "Where the loss determined above significantly understates .. the seriousness of the defendant's conduct, an upward ... departure may be warranted." U.S.S.G. § 2F1.1 comment, (n.7). If both the actual loss and intended loss in this case approach zero, the district court may choose to exercise its discretion and depart upward from the sentence range calculated under the Guidelines.

[20] Some comment is necessary concerning the district court's inclusion of interest in the amount of loss. The current commentary to the Sentencing Guidelines[13] provides that the amount of loss "does not, for example, include interest the victim could have earned on the funds had the offense not occurred." U.S.S.G. § 2F1.1, comment, (n.7). We find that this commentary sweeps too broadly and, if applied in this case would be inconsistent with the purpose of § 2F1.1, *Stinson v. United States*, —U.S.—, —, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993).

Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction. *See, e.g., United States v. Lowder*, 5 F.3d 467, 471 (10th Cir. 1993) (holding that interest should be included in the amount of loss where the defendant promised victims a specific interest rate on their investments); *United States v. Jones*, 933 F.2d 353, 354-56 (6th Cir. 1991) (interest should be included where the defendant defrauded credit card companies which had a reasonable expectation of a specific return on the credit extended). In the words of the district judge, "interest is a loss, a loss of earnings on money—representing a loss of earnings on money that was—that rightfully belonged to the bank and therefore should be also included." 11 R. 42-43. We find no error in the district court's decision to include interest in the amount of loss in this case.

Henderson sentence under count one was calculated in accordance with the Sentencing Guidelines, and therefore, is based, in part, on the amount of loss. The other four sentences were not based on the Guidelines, but may include

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[13] This commentary was added in 1991, after the date of Henderson's offense. It was incorporated to clarify the Guidelines, and therefore, is indicative of the original purpose of those provisions.

consideration of the loss attributable to Mr. Henderson. We therefore VACATE Henderson's sentences and REMAND for resentencing. Because we find the method used to calculate the amount of loss flawed, we do not reach the question of whether or not the result of that calculation was clearly erroneous.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP -3 1992
Michael N. Milby, Clerk
By Deputy: c

UNITED STATES DISTRICT COURT
SOUTHERN District of Texas

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL (For Offenses Committed On Or After November 1, 1987) A**
V.	
KENNETH P. HENDERSON (Name of Defendant)	**TO COUNT 1 ONLY).** Case Number: **H-92-00004-01**
	Dan C. Guthrie Defendant's Attorney

THE DEFENDANT:

☐ Pleaded guilty to count(s)_____

☒ was found guilty on count(s) 1, 2, 3, 4 and 5 on May 12, 1992 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1344 and 2	Bank Fraud, aiding and abetting	Unknown 1988	1
18:656 and 2	Misapplication of funds, aiding and abetting	4-11-85	2
18:1005 and 2	False entries, aiding and abetting	4-11-85	3
18:1344 and 2	Bank fraud, aiding and abetting	10-23-86	4
18:1014 and 2	False statements, aiding and abetting	10-23-86	5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☐ Count(s) _____(is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 250 ($50 each) , for count(s) 1, 2, 3, 4, and 5 , which shall be due ☒ immediately ☐ as follows: CLERK, UNITED STATES DISTRICT COURT, Attention: Finance, P.O. Box 61010, Houston, Texas 77208.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P.O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.: 459-60-2588
Defendant's Date of Birth: August 8, 1942

Defendant's Mailing Address:

930 Gulfshores Dr., Unit 2
Destin, Florida 54321

Defendant's Residence Address:

930 Gulfshores Dr., Unit 2
Destin, Florida 54321

August 27, 1992
Date of Imposition of Sentence

Kenneth M. Hoyt
Signature of Judicial Officer
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

9/2/92
Date

Defendant: **KENNETH P. HENDERSON** Judgment—
Case Number: H-92-00004-01 Page 2 of 3

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIFTY-ONE (51) MONTHS on Count 1, followed by FIVE (5) YEARS on each of Counts 2, 3 and 4, to run concurrently to each other, but consecutive to the term imposed on Count 1;

TWO (2) YEARS on Count 5, to be served consecutive to the term imposed on Counts 2, 3 and 4. (Counts 2 through 5 are not subject to the Sentencing Reform Act.)

☒ The court makes the following recommendations to the Bureau of Prisons: None.

☒ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

- ☐ at _____ p.m. on _____ .
- ☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States marshal.
- ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: KENNETH P. HENDERSON Judgment—
Case No. H-92-00004-01 Page 3 of 5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS as to Count 1.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

The defendant is prohibited from employment in a fiduciary role with any type of financial institution during the term of supervision.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer to schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any person engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: **KENNETH P. HENDERSON** Judgment—
Case Number: H-92-00004-01 Page 4 of 5

RESTITUTION AND FORFEITURE

RESTITUTION

☒ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Federal Deposit Insurance Corporation Attn: Olivia I. Dutton, Section Chief Investigations II 7324 Southwest Freeway, Suite 1600 Houston, Texas 77074-2069	$2,344,646.38

Payments of restitution are to be made to:

District Clerk, Finance Section

☒ the United States xxxxxxxx for transfer to the payee(s).

☐ the payee(s). P.O. Box 61010
Houston, Texas 77208

Restitution shall be paid:

☒ in full immediately; if any balance remains unpaid at the time of release from imprisonment, the remaining balance shall be a condition of supervised release, payable in equal monthly installments of at least $500, (see Attachment 4a)

☐ in full not later than _____.

☐ in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☐ in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☒ The defendant is ordered to forfeit the following property to the United States: $25,000 cash bond, which is to be applied to the restitution.

KENNETH P. HENDERSON
H-92-00004-01

RESTITUTION AND FORFEITURE - (Continued)

Page 4a of 5

"Restitution shall be paid: "(continued)

commencing within 60 days of release. The Court further orders that the $25,000 bond posted by the defendant shall be forfeited to the Government and applied toward this restitution. The restitution amount shall not be abated at the end of supervision, following custody or otherwise until the full amount is paid.

Defendant: **KENNETH P. HENDERSON** Judgment—
Case Number: H-92-00004-01 Page 5 of 5

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): **as to Paragraph 7, the Court finds the defendant was one of several owners of First Bank Tomball and he and others founded Cy-Fair Bank. As to Paragraph 31, the Court finds the loss to total $2,344,646.38; thereby increasing the offense level by 10 pursuant to U.S.S.G. 2F1.1(b)(1)(K).**

Guideline Range Determined by the Court:

Total Offense Level: 22
Criminal History Category: I
Imprisonment Range: 41 to 51 months
Supervised Release Range: 2 to 3 years
Fine Range: $ 7,500 to $ 75,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 2,344,646.38

☐ Full restitution is not ordered for the following reason(s).

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

APPROVED AS TO FORM: RMB